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In the Supreme Court of the United States

OCTOBER TERM, 1964

THE TUSCALOOSA AND VICINITY DISTRICT COUNCIL OF TUSCALOOSA AND SELMA, ALABAMA; AND CARPENTERS AND MILLWRIGHTS LOCAL UNION NO. 1337, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. 2a–9a) is reported at 337 F. 2d 205. The Board's original decision and order (R. 161–172, 88–128)[1] are reported at 124 NLRB 544. Its supplemental decision and order (R. 214–215, 189–202) are reported at 138 NLRB 76.

[1] References designated "R." are to the Transcript of Record printed for the court of appeals, and references designated "J.A." are to the portions of the testimony and exhibits printed as a joint appendix. Copies of both of these documents have been filed with the petition.

JURISDICTION

The judgment of the court of appeals (Pet. 9a) was entered on October 2, 1964. The petition for a writ of certiorari was filed on December 24, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether substantial evidence supported the Board's findings that petitioners maintained closed-shop hiring practices at a construction project and refused to refer eight persons for employment because they had not complied with union membership obligations.

2. Whether the Board properly required petitioners to reimburse nonmembers of Local 1337 for the permit fees which they had to pay in order to obtain employment under the hiring arrangement.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at pp. 1a–2a of the petition.

STATEMENT

From January 1956 to November or December 1957, the H. K. Ferguson Company ("the Company") performed construction services for the Gulf States Paper Corporation at Demopolis, Alabama (R. 89). During this period the Company had a master contract with the United Brotherhood of Carpenters and Joiners, the parent body of petitioners here, which provided

that the Brotherhood would furnish "competent Journeymen as requested" (R. 91; J.A. 199–200). This contract was administered on the Demopolis project by William E. Goodman, business agent for petitioner District Council,[2] whose office was in Tuscaloosa, Alabama, some 60 miles away (R. 93; J.A. 175–176). The Company's superintendent of millwrights followed a standard practice of calling Goodman when he needed men. Goodman, in turn, selected the men and issued referrals. These referrals were shown to the Company's personnel department, which then prepared the necessary employment documents. The superintendent accepted all the millwrights selected by Goodman (R. 93–94; J.A. 46–48). No millwright, with very few exceptions,[3] was allowed to work without a referral from Goodman, even if he had performed satisfactory work on the project in the past (R. 100–101, 103, 104, 105; J.A. 27–30, 32, 52–57, 70–72, 74). The practice was described by the project manager to a group of millwrights seeking work as follows: "I want you down here and he [Goodman] won't give you any referrals and I can't hire you unless he does" (R. 104–105; J.A. 32). In order to secure a referral from Goodman, a millwright had to be or become a member of one of the locals under the District Council's jurisdiction. If he was a member of an outside local, he could pay a working fee, called a "dobie" (J.A. 96–

[2] Petitioner Local 1337 is under the District Council's jurisdiction.

[3] During the Demopolis project the Company hired 192 millwrights. All but 3 were definitely secured through Goodman (R. 94; J.A. 28, 189–192).

98, 113–114, 125, 132).[4] The local's dues were $4 a month, while the dobie was $4 a week (R. 123; J.A. 98, 114).

About November 23, 1957, the millwrights on the Demopolis project became dissatisfied with their wage and walked off the job (R. 95; J.A. 13–14, 64–66, 89, 126–127). In return for the promise of the project manager that he would try to get an increase for them, they returned to work (R. 95; J.A. 66, 156). When no increase was granted by December 21, the millwrights threatened to walk out again, but they were persuaded to wait for another week (R. 95–96; J.A. 14–16, 67–69, 104, 114–115, 137, 158–161, 165, 147–148). As the end of the week approached, it was rumored that no increase would be granted (R. 96–97; J.A. 147–148). On Friday, December 28, every millwright but the union steward walked off the job (R. 96; J.A. 14–16, 69, 107, 148). On Saturday, December 29, the project manager sent a telegram to Goodman requesting that he supply the project with 50 millwrights immediately (R. 97; J.A. 161). Goodman received this request on Monday, December 31. He then attempted to persuade the strikers to return and issued a number of referrals for them. On ascertaining by phone that the local at Sheffield, Alabama, had 17 men available, he requested that they be sent to the project (R. 97–99; J.A. 70–71, 179–182).

[4] A member of an outside Brotherhood Local could change his membership from his home local to a local belonging to petitioner District Council (called "clearing") and pay dues to the latter, or he could continue his membership in his home local and pay the "dobie" to the District Council. In the instant case some of the men changed locals (J.A. 103, 136–137, 117–118, 139–140, 144–145).

On Wednesday, January 2, the next working day, a few of the strikers who had been issued referrals appeared at the project gate. The union steward met them and announced that the millwright superintendent was absent, whereupon they left (R. 98; J.A. 19–20, 24–25, 80–81). Later in the morning, nine millwrights from Sheffield arrived at the gate, presented referrals issued them by Goodman, and went to work (R. 98–99; J.A. 27, 205–211, 82). During the course of the day, Goodman replaced the union steward with one of the men from Sheffield, and the steward quit in protest (R. 99; J.A. 20–21).

At noon on January 2, the project manager, Goodman, and a representative of the Brotherhood met and negotiated a supplementary agreement which increased the hourly wage rate for the millwrights (R. 99; J.A. 162–163, 201). At the end of the conference, a Company official complained to Goodman that there were no former millwrights and very few new ones from Sheffield on the job (R. 99–100; J.A. 186). Goodman thereupon directed his secretary to telephone the Chattanooga local for 30 millwrights, and was informed that they were available and would report within the next few days (R. 100; J.A. 187–188). Later that day, Goodman learned that the strikers were still acceptable to the Company, with the exception of one apprentice (R. 110; J.A. 195). During the next few days, the Company reaffirmed this position at least twice (R. 101, 104–105; J.A. 32, 86–87). Nevertheless, on the morning of January 3, Goodman called the clerk at the Demopolis project gate, and told her that he had revoked all the referrals issued

to the former millwrights and that they should not be permitted to work (R. 100–101; J.A. 166–168). A substantial number of former millwrights appeared at the gate, were told of Goodman's revocation of their referrals, and were refused entrance (R. 101; J.A. 27–30, 70–72, 169). Meanwhile, Goodman continued to refer Chattanooga and Sheffield millwrights to the project (R. 105–106; J.A. 49–51).[5]

About January 3, at a time when the millwrights from Sheffield and Chattanooga were being given referrals and reporting for work, Goodman told a group of former millwrights that their referrals had been revoked because "you didn't go back to work when I told you to go to work," and that "they were not going back on that job while he was business agent as long as he could keep them off" (R. 101; J.A. 86). During the next few days, Goodman repeatedly said that he would not return the former millwrights to work because they had "crossed" him (R. 110; J.A. 141, 143).

Foreman Herman McGilberry was on vacation from December 21 until January 3 and was not involved in the walkout of December 28 (R. 102; J.A. 91–92, 95–96). On January 3, he went to the project and received permission from the superintendent to report to work the following day. As he was leaving, he heard Goodman tell a group of millwrights who were standing in the road that he was not going to let any of the former employees go back on the job. McGilberry spoke up and said that he had just talked

[5] The Company hired 41 "millwrights and apprentice millwrights" between January 2 and January 7. After that, it hired no more until January 31 (J.A. 205–211).

to the millwright superintendent and was told that he could return. Goodman replied, "I'm not going to let you go back to work, either" (R. 102; J.A. 92–95). When McGilberry reported the next day, the superintendent said that he could not put him back to work even though both he and the construction superintendent wanted him to go to work (R. 102; J.A. 92–95).[6]

On January 7, eight former millwrights signed their names to a telegram to the Brotherhood asking for an investigation as to why they were being kept off the job (R. 105; J.A. 74). At a union meeting on the night of January 8, Goodman read the telegram aloud and announced in substance that so far as he was concerned the men who had signed it would not get any more jobs in the area (R. 105; J.A. 75).

On these facts, the Board concluded that the master contract, as administered for the Demopolis project, created an illegal closed shop, because "a referral by Goodman was a prerequisite to hire" and "Goodman conditioned referrals upon matters connected with union membership or obligations" (R. 192–193, 116–117, 122–123). It also concluded that the eight millwrights named in the complaint, who had been working on the project in December 1957 and were thereafter denied further employment, had been discriminated against by Goodman because they had refused to comply with the union membership obligations imposed by him (R. 193, 116–117).

[6] McGilberry's termination slip stated on it, "Requested not to be put back to work by Mr. Goodman of Tuscaloosa Local" (R. 103; J.A. 52–57, 212–213).

The Board's order required petitioners to cease and desist from maintaining any arrangement or practice which conditions referral or employment upon union membership, and from causing or attempting to cause the Company or any other employer to discriminate against employees or applicants for employment in violation of Section 8(a)(3) of the Act (R. 198). The order also required petitioners and the Company, jointly and severally, to reimburse the eight named employees for any wage loss they may have suffered as a result of the discrimination against them, and to reimburse all millwrights and millwright apprentices who came from locals outside the jurisdiction of the District Council, and who worked at the Demopolis project, for "permit fees and/or dobies they paid in order to obtain employment" (R. 194, 189, 125–127).[7] The court of appeals enforced the Board's order in full (Pet. 2a–7a).

ARGUMENT

The issues which petitioners seek to raise are not presented. The decision of the court of appeals is correct, and it is entirely consistent with decisions of this Court and of other courts of appeals. Con-

[7] The findings and order summarized above are from the Board's supplemental decision and from those portions of its initial decision which it affirmed on reconsideration. As the Board noted (R. 189–192), the supplemental decision excised those portions of the initial decision which were predicated on principles rejected by this Court in *Local 60, Carpenters* v. *National Labor Relations Board*, 365 U.S. 651; *Local 357, Teamsters* v. *National Labor Relations Board*, 365 U.S. 667; and *National Labor Relations Board* v. *News Syndicate Co.*, 365 U.S. 695.

sequently, there is no occasion for further review by this Court.

1. In its supplemental decision the Board held that the practice followed by the Company and by petitioners in the execution of their collective bargaining agreement "established closed-shop conditions at the Demopolis project" (R. 192). This conclusion was based not on the bare fact that control over employment opportunities had been delegated to Goodman, the union's business agent, but on the particular standards used by Goodman in exercising this authority. The Board did not, in this case, strike down a hiring hall arrangement as unlawful *per se*; rather, it considered the actual operation of the arrangement in its entirety. Its conclusion that "Goodman conditioned referral upon matters connected with union membership or obligation" (R. 193) is supported by substantial evidence (see pp. 3–4, 6–7, *supra*)[8] and was properly sustained by the court of appeals. This Court's decisions in *Local 357, International Brotherhood of Teamsters* v. *National Labor Relations Board*, 365 U.S. 667, and *National Labor Relations Board* v. *News Syndicate Co.*, 365 U.S. 695, do not—as petitioners contend (Pet. 14–17)—conflict with the Board's conclusion in this case since those decisions concerned only the question whether exclusive union hiring halls are illegal *per se*. Indeed, in *News Syndicate*, this Court observed that whether the actual operation of such an arrangement was to maintain and enforce

[8] Particularly to be noted in this connection is the fact that on at least two occasions non-union men were denied employment until they joined the Brotherhood (J.A. 125, 132).

closed-shop or preferential-hiring conditions "raises a distinct question." 365 U.S. at 700. It was that question which the Board decided here on a record showing actual discrimination in the operation of the referral system.

2. That discrimination was not based, as petitioners contend (Pet. 10–14), on the employees' refusal to honor a no-strike commitment or to refrain from wildcat activity. The Board found explicitly that the eight employees who were discriminatorily denied employment were not given referrals by Goodman "because they had 'crossed' him, because if he issued to them referrals it would embarrass him with other locals from whom he had ordered millwrights, because they had sent a telegram to the United Brotherhood asking in effect that Goodman be investigated, because he wanted to show them he was the 'boss'" (R. 116). These were all matters of internal union discipline, none of which could lawfully be used as a basis for denying employment to the allegedly offending members. See *National Labor Relations Board* v. *Local Union No. 85, Sheet Metal Workers' International Association,* 274 F. 2d 344 (C.A. 5), certiorari denied, 366 U.S. 908; *National Labor Relations Board* v. *Millwrights' Local 2232,* 277 F. 2d 217 (C.A. 5), certiorari denied, 366 U.S. 908.

Since the Board found that these were the grounds on which the eight employees were denied referrals, this case does not present the question whether it would be unlawful for the union to deny employment under a hiring hall arrangement for a reason which could permissibly be used by an employer to discharge

his employees. *National Labor Relations Board* v. *Local 294, International Brotherhood of Teamsters,* 317 F. 2d 746 (C.A. 2), and *Miranda Fuel Co.,* 140 NLRB 181, are inapposite, for it is clear that even an employer acting alone could not discharge employees for the breaches of discipline upon which the union representative here based his denial of employment.

3. Finally, there is no merit to petitioners' contention (Pet. 17–22) that the Board's order, insofar as it requires the reimbursement of "permit fees and/or dobies" to millwrights who came from outside locals, is in conflict with *Local 60, United Brotherhood of Carpenters* v. *National Labor Relations Board,* 365 U.S. 651. Members of locals under the jurisdiction of petitioner District Council paid $4 a month dues. Members of outside locals, on the other hand, had to pay a $4-per-week permit fee if they wished to retain membership in their home local while working on the Demopolis project.[9] Since the members of the outside locals had to continue paying dues to their home local while paying the dobie to Local 1337, the Board could reasonably conclude that the dobie was paid by outside millwrights only because of the requirements of the illegal hiring arrangement. In these circumstances, a refund of the illegally exacted dobie payments was

[9] Petitioners challenge the correctness of the finding that the permit fee was $4 a week (Pet. 20, n. 10). However, this finding is based on the sole reference to the matter we have been able to find in the record (R. 123; J.A. 114). The other reference noted by petitioners (J.A. 118) concerns the amount of dues required for a man cleared from his home local into Local 1337 (see n. 4, p. 4, *supra*).

appropriate. See *Morrison-Knudsen Co.* v. *National Labor Relations Board,* 275 F. 2d 914, 917 (C.A. 2), certiorari denied, 366 U.S. 909;[10] *National Labor Relations Board* v. *Teamsters and Allied Workers, Hawaii Local 996,* 313 F. 2d 655, 659–661 (C.A. 9). This Court's decision in *Local 60, supra,* is not to the contrary. That case involved a refund order in which *all* dues for the period of the unfair labor practice were to be repaid to the employees. This Court concluded that it was impermissible for the Board to assume that the closed-shop agreement had coerced old-time union members into paying their dues. In the present case, on the other hand, the remedy granted by the Board is directed not at all dues (as, for example, those which the outside millwrights continue to pay to their home locals), but to the specific proceeds of the illegal hiring arrangement—the "permit fees" or "dobies." As to these payments, the refund order was permissible since they were "induced, obtained, or retained" (365 U.S. at 656) as a direct result of the unlawful practice.

[10] Although the Second Circuit denied enforcement of the Board's refund order in that case, it did so, insofar as the dobies were concerned, only on the ground that the Board had required the employer alone to make the reimbursement, and this was inequitable (275 F. 2d at 918). Here, on the other hand, the Board has followed its normal practice (see *National Labor Relations Board* v. *Puerto Rico Steamship Association,* 211 F. 2d 274 (C.A. 1)) of making the offending union and the employer jointly and severally liable for the refund.

CONCLUSION

For the above stated reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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